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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RICKEY WHITEHEAD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I.

WHETHER AN AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT BASED ON AN INFORMANT'S UNDATED OBSERVATION, WHICH FAILS TO PROVIDE FACTS INDICATING THAT THE ITEMS SOUGHT COULD BE FOUND AT THE TIME THE WARRANT ISSUED, IS SUFFICIENT TO ESTABLISH PROBABLE CAUSE.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Rickey Whitehead, by and through undersigned counsel, petitions this Court to issue its Writ of Certiorari to the Eleventh Circuit Court of Appeals.

CITATION TO OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals affirming the District Court's denial of the Motion to Suppress is unpublished, and is attached as Appendix A.

The District Court's denial of the Motion to Suppress was rendered in the course of the suppression hearing, and is unpublished. The transcript of the suppression hearing is attached as Appendix B.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on October 8, 1986, and the order on Petition for Rehearing and Rehearing En Banc was entered on November 13, 1986. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment IV of the Constitution of

the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unnecessary searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On November 14, 1985, petitioner's home was searched pursuant to a warrant obtained and executed by officer Regina French of the Alachua County, Florida, Sheriff's Office. Officer French stated in the search warrant affidavit that a confidential source had been inside petitioner's home and seen what the source believed to be drug paraphernalia, a firearm, marijuana and traces of cocaine in open dresser drawers. The affidavit did not indicate when the informant had made these observations. Officer French assessed the informant's basis of knowledge solely from his description of the items

allegedly viewed. Officer French knew nothing of the source's reliability or veracity, and was given only his nickname.

Five days after her phone conversation with the confidential source, Officer French confirmed that utilities accounts for the house to be searched were listed in petitioner's name. The only other dated information in the affidavit noted petitioner's arrest two years previously for possession of marijuana. Finally, the affidavit noted that petitioner was the subject of an investigation by another police department across the state. The affidavit did not suggest that the investigation had led to suspicions of contraband in petitioner's home at the time the warrant issued.

Petitioner was indicted for four counts of unlawful possession of firearms, one count of possession with intent to distribute marijuana, and one count of possession with intent to distribute

cocaine. Prior to trial, petitioner filed three motions to suppress evidence seized from his home and automobile. The motions were denied following a suppression hearing. Appellant then entered into a plea agreement wherein he agreed to enter a guilty plea to counts one and six. Both the cocaine and the weapons, which formed the basis of counts one and six, were seized from petitioner's residence. Pursuant to the plea agreement, petitioner specifically reserved his right to appeal the denial of his motions to suppress. This agreement was accepted by the district court.

Petitioner filed a Notice of Appeal on April 8, 1986. After briefs were submitted but without setting the case for oral argument, a panel of the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of petitioner's motions to suppress on October 8, 1986. Without acknowledging petitioner's argument that a staleness

analysis was required, and without reference to the undated informant's observations, the panel affirmed the District Court's summary finding that the warrant established probable cause under the totality of the circumstances. The Eleventh Circuit denied a Petition for Rehearing and Suggestion for Consideration En Banc on November 13, 1986.

ARGUMENT

I.

AN AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT BASED ON AN INFORMANT'S UNDATED OBSERVATION, WHICH FAILS TO PROVIDE FACTS INDICATING THAT THE ITEMS SOUGHT COULD BE FOUND AT THE TIME THE WARRANT ISSUED, IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE.

A. The Opinion Below Conflicts With Precedent of This Court, Other Federal Circuit Courts of Appeal, and Highest State Courts' Interpretation of Federal Law

The opinion below conflicts with relevant precedent in two distinct ways: by failing to analyze the search warrant affidavit for staleness, and by finding that a warrant based on undated informant observations established probable cause.

In summarily finding the search warrant affidavit established probable cause under Illinois v. Gates, 462 U.S. 43 (1983) and Massachusetts v. Upton, 466 U.S. 727 (1984), the Eleventh Circuit failed to analyze the affidavit to elicit facts

establishing that probable cause existed at the time the warrant issued. Such an analysis is required by Sgro v. United States, 287 U.S. 206 (1932).

Sgro held that a search warrant must contain "facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case." 287 U.S. at 210. In Sgro the Government's attempt to reissue a warrant which had exceeded the statutory time limit for execution violated the requirement that probable cause exist when the warrant issued. Since the commissioner "took no proof to show that probable cause then existed" the warrant was held invalid.

The magistrate in the instant case had no proof indicating that the items listed in the warrant would be found at petitioner's home on the date the warrant issued. Both the District Court and Court

of Appeals failed to offer any facts from the search warrant affidavit to support their finding of probable cause. Since the Eleventh Circuit ignored Sgro's mandate in the instant case and in the process created a conflict between the circuits, the instant petition should be granted. The need for review is further evidenced by the conflict created between precedent of the federal circuits and highest state courts, as well as the Eleventh Circuit's own precedent, by the panel's failure to conduct a staleness analysis.

The "staleness" doctrine emanating from Sgro has become a well-established tenet of search and seizure law in both federal and state courts. The Eleventh Circuit, for example, has consistently followed Sgro in demanding that "the government must reveal facts that make it likely that the items being sought are in that place when the search warrant issues." United States v. Domme, 753 F.2d 950, 953

(11th Cir. 1985). The Eleventh Circuit recognized Sgro's mandate that "staleness is an issue that courts must decide by evaluating the facts of a particular case." 753 F.2d at 953, citing United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984) (emphasis added). Accord United States v. Shomo, 786 F.2d 981 (10th Cir. 1986); Bastida v. Henderson, 487 F.2d 860 (5th Cir. 1974); State v. Tella, 321 A.2d 87 (R.I. 1974); State v. Austria, 524 P.2d 290 (Hawaii 1974).

The opinion below also conflicts with decisions of federal circuit courts and highest state courts addressing the issue of search warrants based on undated informant observations. Courts have consistently required that observations used to establish probable cause be dated where no date is inferred from other facts in the affidavit.

Since the staleness analysis required by Sgro is foreclosed where such dates are

lacking, most federal circuit courts have applied a per se rule rendering search warrants relying on informant observations facially invalid. See United States v. Button, 653 F.2d 319 (8th Cir. 1981); United States v. Boyd, 422 F.2d 791 (6th Cir. 1970); Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966); Poldo v. United States, 55 F.2d 866 (9th Cir. 1932); People v. Bauer, 552 P.2d 512 (Colo. 1976). The Tenth Circuit has validated such warrants only where a date can be unequivocally supplied to the informant's observation in the context of other facts in the affidavit. United States v. Miles, 772 F.2d 613 (10th Cir. 1985); accord State v. Tella, 321 A.2d 87 (R.I. 1974). The panel opinion below defies this precedent. The resulting conflict between the Eleventh Circuit, other federal circuit courts and state courts should be resolved to ensure uniformity in the definition of the constitutional requirements of probable cause.

B. This Petition Presents An Important Constitutional Issue Not Yet Addressed By This Court.

The issue presented involves the fundamental constitutional requirement of probable cause in the issuance of search warrants. The per se rule developed by the federal circuit courts of appeals rendering search warrants based on undated observations invalid illustrates the importance given this issue by the courts. In disposing of this important issue, the opinion below applied this Court's precedent in an inconsistent manner, thereby requiring this Court's review.

The panel opinion interprets the holdings of Illinois v. Gates, 462 U.S. 43 (1983) and Massachusetts v. Upton, 466 U.S. 727 (1984) effectively to overrule Sgro v. United States, 287 U.S. 206 (1932). The panel opinion misapplied both Gates and Upton. Neither case directly addressed the issue of undated informant's observations or the staleness doctrine; however, each

case inherently affirmed the requirement of timely information to establish probable cause.

Both cases depended upon the informants' predictions of future behavior, and police corroboration of the fulfillment of those predictions. The accurate predictions verified the informant's veracity and contributed to probable cause--verification lacking in the instant case. Since the affidavits were based on freshly corroborated information, Gates and Upton underscore Sgro's requirement that the Government prove facts sufficient to establish the timeliness of probable cause.

The panel opinion vitiates both opinions, and consequently the Fourth Amendment's application to governmental searches of private homes, by finding the warrant established probable cause in the totality of the circumstances without citing facts establishing timeliness. This petition should be granted to decide the

fundamental constitutional requirements at issue, and to review the Eleventh Circuit's application of this Court's recent decisions which effectively overrules prior precedent of this Court.

CONCLUSION

The opinion below conflicts with precedent of this Court, federal circuit courts of appeals, and highest state courts by failing to conduct a staleness analysis and in holding that a search warrant based on undated informant observations establishes probable cause. This petition should be granted to resolve these conflicts and to decide the fundamental constitutional issues of whether a search warrant relying on undated observations establishes probable cause where no date for the observations can be inferred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Ross A. Nabatoff, Esquire, United States Attorney, 227 North Bronough Street, Suite 4014, Tallahassee, Florida 32301; by mail, this _____ day of January, 1987.

Elizabeth L. White
ATTORNEY